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The potential influence of prior work experience on unfair dismissal arbitration decisions related to employee misconduct: an exploratory study of decision styles

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This article reports on an exploratory aspect of a larger study that examines unfair dismissal arbitration decisions relating to misconduct derived dismissals made by Australia's federal industrial tribunal. The central proposition explored is that an association occurs between the arbitrator's work history and their decision to overturn a dismissal. The arbitrators' previous occupations were classified based on their alignment with unitarist (employer harmony) and pluralist (worker interests) frameworks, or the 'blended' place in between. Subsequent logistic regression modelling allowed us to identify three types of arbitral decision styles: systems-driven, evidence-based and restorative-voice. These decision styles offer our readership a descriptive framework that consolidates statistically significant decision factors. Australian media reports and professional forums scrutinise the appointment of members to its national industrial tribunal and the decisions that they make. The decision styles presented here can inform organisational stakeholders, including workers, HR managers, supervisors, unions and industry bodies who need to apply and/or respond to misconduct-driven dismissal processes or formulate relevant policies, processes and systems such as codes of conduct or performance management.

Keywords: arbitration decisions, employee discipline, misconduct, unfair dismissal

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Key points

1 *Systems-driven decisions* focus on policy-driven harmony via managerial prerogative to design and administer systems for managing misconduct. Key decision factors include remorse and severity of the behaviour.
2 *Restorative-voice decisions* focus on minimising the uneven power dynamic between employer and employee. Key decision factors include remorse and type of misconduct.
3 *Evidence-based decisions* sit within a middle-ground between the other two styles and focus on quantifiable evidence of disciplinary records and processes used in the dismissal. Key decision factors include disciplinary history and procedural formality.

Introduction

There is a vast literature on the relationship between individual attributes and decision making. Decisions we make may be influenced by variables such as values, attitudes, personality, biases, heuristics, time, religiosity and so on. Personality, for example, is thought to be up to 50% hereditable, with the remainder shaped by the environment and life experiences (Turkheimer 2000). Values, attitudes and heuristics also develop because of experiences and societal conditioning (Hanel, Foad and Maio 2021; Kahneman 2011). Personality is closely related to work choice, job satisfaction and expertise (Barrick, Mount and Judge 2001; De Jong et al. 2019; Törnroos, Jokela and Hakulinen 2019; Wijesundara and Kaluarachchige 2021). Additionally, the decisions we make draw on our crystallised intelligence, that is, the knowledge accreted over time (Rose and Gordon 2015). Crystallised knowledge is 'domain specific', tied to our experiences and used in solving new problems. Therefore, our prior experience may provide a lens to how we view problems and make consequent decisions. Thus, it is likely that prior work experience will influence decisions we make. In this article, we apply this logic to the context of employment arbitration, specifically in cases where the arbitrator must determine the fairness of a worker's dismissal for misconduct.

Unfair dismissal occurs when an employee is dismissed on harsh, unjust or unreasonable terms, which can include the procedure used to administer the dismissal (Shi and Zhong 2018). To date, limited research has been conducted to understand the effect of an unfair dismissal on impacted stakeholders, employee rights and employment arbitrators (Gough and Colvin 2020). This knowledge gap exists despite the negative implications an unfair dismissal has on a person's dignity, autonomy and/or personal development (Collins 2021). An employee may be able to escalate their dismissal to an external employment tribunal or alternate dispute resolution service. At this point, both parties' actions are subject to detailed scrutiny and potentially to binding arbitration to determine whether the dismissal is fair.

To be dismissed unfairly from one's job is one of the most distressing and harmful events that can occur within the employment relationship (Collins 2018). Economically, unfair dismissals result in reduced productivity and employability along with administrative, legal and compensation costs (Freyens and Oslington 2021). Such impacts are compounded by an array of unseen social costs such as detrimental impacts on the physical and psychological health of the people involved, their work and personal relationships, their family life and more broadly on social values (Oslington 2012; Southey 2016). The harms are clearly more than monetary impacts, with evidence suggesting the parties, for the most part, pursue their cases for reasons beyond financial compensation (See, Barry and Peetz 2022).

Changing community standards related to an employee's conduct were recently cited by an Australian employment arbitrator in upholding a company's decision to dismiss an employee for sexual harassment (Deutsch 2022). This decision exemplifies how employment arbitrators aim to reflect societal values in relation to what the public would consider to be an unreasonable behaviour to exhibit in the workplace. Arbitration decisions determining misconduct-derived dismissals are distinctive for assessing what were potentially 'heated' dismissal situations (Freyens and Gong 2017, 125), reflecting highly emotive, combative, and/or irrational events in the employment relationship. At these times, the dynamics of negative emotions, such as anger and fear, are heightened and impact a range of vulnerable stakeholders (Fida et al. 2018). It is noted that the misconduct-derived arbitration decisions that were sourced for this study reflect what are rare events compared to the full ambit of unfair dismissal claims seen by Australia's national industrial tribunal, which it resolves extensively through conferences and conciliation (FWC 2021). However, these occasional misconduct arbitration decisions contain powerful findings, loaded with intelligence for a broad range of invested and interested parties. These decisions reflect shifting community norms and expectations, they are bounded by legislation and quasi-legal processes, they influence operational standards for workplace policy and behaviours, and ultimately provide lessons on policy and procedural nuances to inform workplace practices. These are the reasons why the analysis presented here focuses on examining misconduct derived unfair dismissal resolved by arbitration.

In Australia, arbitration is provided by employment tribunals with its key national tribunal currently operating under the nomenclature of the Fair Work Commission. This institution is of significant 'public value', expected to reflect virtues of impartiality, informality and accessibility, affordability, fairness, expertise, efficiency and to deliver both substantive and procedural justice to the parties seeking its dispute resolution services (Ross 2016). Typically, the people making arbitral level decisions, as in the Australian case, must have experience in one or more areas including: law, workplace relations, academia, business, industry or commerce, or associations representing the interests of employers or employees (Fair Work Act 2009). In view of the arbitrators' influence on workplaces and beyond, there is value in exploring how their prior career roles are associated with their decisions. Essentially, the germane experience required to be appointed as an arbitrator often placed them in jobs associated with either unitarist or pluralist perspectives,

perspectives reflecting the tensions in employee-management relations and contributing to their 'crystallised knowledge' (Rose and Gordon 2015). This article therefore analyses arbitral decisions grouped according to whether the arbitrator once performed typically pluralist-driven, union/worker-focused roles (such as union representative or union lawyer), or unitarist-driven, employer-sensitive roles (such as a HR manager, employer association advocate, or a managerial consultancy role). A third group of decisions is also considered for those arbitrators with 'blended' professional histories, a mix of unitarist and pluralist type work and/or other roles such as in the public service or academia.

Three decision styles associated with the arbitrator's work history are presented: *systems-driven*, *evidence-based* and *restorative-voice*. These styles are based on hierarchical logistic regression modelling that identified statistically significant features present within 565 unfair dismissal claims determined by 58 employment arbitrators (i.e. 'commissioners' in Australia) over a 10-year period. In Australia, the tribunal assigns the arbitrator – the parties do not select them. Therefore, these decisions reflect the chance allocation of an arbitrator, creating the 'quasi-experimental' conditions to test the spontaneous relationship between the arbitrator's work history and the factors influencing their decisions.

The three decision styles profiled from the analysis can guide the behaviours and decisions of managers, workers and their respective advisors and advocates in managing employee misconduct and the appropriate disciplinary method in the first place. At a societal-level, this article contributes to the knowledge that unfair dismissal arbitration decisions do influence and guide management–employee relations and workplace disciplinary processes. This impact results from unfair dismissal protections existing to support individual workers to seek remediations for harsh, unjust and/or unreasonable dismissals (Landau and Allen 2019) and their associated institutional structures being expected to uphold principles of job security, job property, a right to work and justice in our workplaces (Howe 2017). To this end, arbitration decisions have the power to send educative signals to management, workers and associated parties (Stewart 2011) about what constitutes either a fair or unfair dismissal.

Literature review

The influence of unitarist and pluralist thought on arbitrators' prior work roles

Unitarism and pluralism (Fox 1971) are seminal competing frameworks for describing how employers and workers behave in the employment relationship. Although other ideologies appear in the workplace relations discourse, these are the two perspectives that are generally adopted by government and employers in Australia (Ressia, Werth and Peetz 2019) and in the management literature (Geare, Edgar and McAndrew 2006). Unitarist thought assumes workplace interests are aligned between workers and management and when conflict arises, the problem is seeded by the employee, rather than by issues within the employment relationship (Budd and Bhave 2019). Problems initiated by employees are preferably dealt with in-house and overcome with improved human resource and management policies and processes that include trying to 'manage conflict

away' (Budd and Bhave 2019, 3). For instance, managers view it as an employer's prerogative to dismiss a worker if they decide the worker behaved in a manner so serious that the employer no longer wanted to provide a job to the worker. Such managerial prerogative to banish a 'dishonourable employee' (Watson 2008, 214) reflects the unitary frame of reference that idealises a harmonious employment relationship and is generally adopted by human resource managers and organisational managers (Kaufman 2019).

Meanwhile, the pluralist framework represents the industrial relations perspective (Kaufman 2019) and adopts the ideal of 'loyal opposition' and is embraced by union organisations and employees in general (Watson 2008). Pluralists regard the relations between workers and employers as one of 'structured antagonism ... there is always a latent conflict between them of pay, working conditions and other terms of employment' (Harley 2004, 320). Budd and Bhave (2019) describe how pluralists expect workers to have a voice in the employment relationship and in setting organisational priorities. To do so, pluralists seek assistance via external institutions and social structures that can facilitate their bargaining positions (Dabscheck 1983; Kochan 1998). For example, unfair dismissal legislation caters for the pluralist response by providing an avenue for the dismissed worker to seek a hearing with a neutral third party. Although employers have the right to establish rules of conduct, when it comes to exercising their rights to 'punish' transgressions by employees via dismissal, pluralists would advocate that when 'management acts the union reacts' (Blancero and Bohlander 1995, 618).

In summary, dismissing an employee reflects a typically unitarist action taken by an employer to resolve an employee issue as they see appropriate, against pluralist interests and mechanisms, that is, regulation of the employer's action by external parties through legislation, industrial tribunals, courts and/or alternate dispute resolution. At the same time, any person involved in an employment relationship is unlikely to escape the implications of either of these two frameworks. While it is recognised that people can move between paradigms and personally respond to one set of ideals yet operate from another (Cullinane and Dundon 2014), for whom, and how often this dichotomy occurs, remains unknown.

The role and obligations of employment arbitrators

ILO Convention 158 obligates signatories to provide worker protections in cases of dismissal due to economic or disciplinary reasons (Signoretto and Valentin 2019). These protections involve obligations to provide a valid reason for dismissal (Collins 2021) and to develop processes to review an employee's dismissal less formally and less litigiously using, for instance, dispute-resolution and appeal avenues via mediation, conciliation and, as a last resort, arbitration. In the event a dismissal eventuates to arbitration, notably, the arbitrators are not obliged by the same legal standards as court judges, and they can dispense their decisions autonomously without 'intrusive oversight by the courts' (Gough and Colvin 2020, 480). However, like judges, arbitrators must umpire disputes impartially (Helm, Wistrich and Rachlinski 2016). Arbitrators are still expected to deliver decisions that reflect a legal truth but afforded at a fair cost and in a time efficient manner (Mourell

and Cameron 2009). They have power to interpret legislation (Gough and Colvin 2020) and shape the course of future decisions; while it has also been suggested that their role calls upon them to be commercial problem-solvers (Cole, Ortolani and Wright 2018). The intricacies of their decisions, however, are mostly unknown, with Franck et al. (2016) referring to arbitral decision as a 'black box' where intuition and impressions exist alongside deliberation. Their ability to be impartial, and knowing which factors influence their reasoning patterns capture some of the 'spontaneously' arising questions about the nature of the quasi-judicial work performed by arbitrators (Cole, Ortolani and Wright 2018, 1).

As part of gathering the lessons from their decisions, this article's underlying thesis is that an arbitrator's prior work roles may be an inherent factor in their determinations. For instance, US employment arbitrators who had worked previously as lawyers representing the interests of employers were significantly less likely than other arbitrators to decide cases in favour of employees (Gough and Colvin 2020). And, while arbitrators are not court judges, it is interesting to note that Freyens and Gong's (2017) study found that employment judges with an employer association background were, again, less likely to rule in favour of the employees. Some scholars question whether it is even humanly possible for arbitrators to be consistently neutral (Franck et al. 2016; Guthrie, Rachlinski and Wistrich 2007; Helm, Wistrich and Rachlinski 2016), with latent influences on their decisions potentially from the ideological influences of their appointing party (Puig and Strezhnev 2017) and the effects of their prior career socialisation (Gough and Colvin 2020, 483).

Employment arbitrators make decisions in contentious and often ambiguous decision-making situations, which are often without an obviously correct solution (Girvan, Deason and Borgida 2015). Such a dilemma can be the case, particularly when determining claims from employees who have been dismissed due to the heightened human emotions surrounding misconduct. While neutral and non-partisan judgements are an indispensable aspect of any court or tribunal system (Badó 2014), the viability of the notion that judges, arbitrators and adjudicators can make entirely neutral and unbiased decisions remains a constant question. For instance, in their examination of bias and perceptions in the English judicial system, Higgins and Levy (2019) explain that by its very nature, judges are unaware if a subconscious bias has influenced their decision and, moreover, its presence will not always result in a detectable error in their judgement. Scholars also recognise that judges and arbitrators have human frailties and that their decision-making process is the same as everyone else (Franck et al. 2016; Guthrie, Rachlinski and Wistrich 2007; Helm, Wistrich and Rachlinski 2016). Prior research has also found that employment arbitration decisions can be inconsistent due to factors such as: influences from personal relationships (Glynn and Sen 2015); feelings towards litigants (Wistrich, Rachlinski and Guthrie 2015); misdirection techniques (Rachlinski, Wistrich and Guthrie 2013); the 'repeat player' effect (Giesbrecht-Mckee 2014); hindsight bias (Rachlinski 2000); fairness orientation (Simpson and Martocchio 1997); ambivalent sexism with benevolent tendencies (Girvan, Deason and Borgida 2015); and appointing party

affiliation (Puig and Strezhnev 2017). Taken together, evidence suggests that arbitrators may be influenced by incidental external and internal factors when making their binding decisions.

The influence of an arbitrator's work history on their decisions

Crow and Logan (1994) contend that arbitrators philosophically orientate to employer or employee, even if only at a subliminal level. They suggest that arbitrators have an 'award orientation', which reportedly provides insight on the arbitrator's value system and which they defined as 'the extent to which his/her bias in awards favors either management or the union or demonstrates a propensity for modifying awards' (Crow and Logan 1995, 114). Award orientation is thought to be moderated by an arbitrator's work history (Simpson and Martocchio 1997), a salient point for the investigation at hand as these two prior studies theoretically link the potential for work history to influence decision making. In addition to the Australian-based work by Freyens and Gong (2017, 2020), other studies have identified influential relationships between an arbitrator's background and their arbitration decision, although different measures of an arbitrator's background have been applied, returning mixed results. Bingham and Mesch (2000) found that arbitrators with a legal background were less likely to reinstate a dismissed worker, compared to arbitrators with an academic background. Bemmels (1990, 188) measured professional background according to whether the arbitrator had a management, union, legal or academic background and found that business professors had an 'accute aversion' to awarding partial reinstatements, and academic backgrounds associated with more lenient suspension penalties than the other professionals; but overall found limited evidence linking arbitrator characteristics to their decisions. Heneman and Sandver (1983) considered the most comprehensive range of past occupations – business academic, IR academic, economics academic, law academic, attorney, federal employee, state employee, arbitrator, consultant, management employee, union employee and 'other' – and found an absence of significant relationships between any of the occupations and arbitral decisions.

In summary, scholars have established work history as a likely factor moderating the decision-making process of arbitrators. However, how that effect occurs is still to be clearly discerned given the diversity in findings reported in previous studies. One contributing factor for the disparate findings is that each researcher selected a unique and exclusive set of specific occupations for measurement. To address this methodological issue, this study adopts the unitarist and pluralist frameworks that enabled us to categorise any potential occupation held by the arbitrators prior to their appointment into either 'management', 'union' or 'blended'. This method provides what appears to be the most inclusive approach to date to examine variations that might be manifesting in misconduct-derived, unfair dismissal arbitration decisions based on the arbitrators' prior work history. Based on our central proposition that an association occurs between the arbitrator's prior occupations and their decisions

to overturn a dismissal, that following hypothesis statement is presented for analysis in the next section:

Hypothesis 1: The independent variables that are statistically significant in contributing towards the probability that an arbitrator will find in favour of the dismissed worker will vary when these decisions are grouped according to the arbitrators' work histories.

Research method

Records of unfair dismissal arbitration decisions by Australia's national workplace tribunal are publicly available on its website (https://www.fwc.gov.au/hearings-and-decisions). This investigation considers every misconduct-related unfair dismissal *substantive* arbitration decision (i.e. those decisions judged for harshness, unjustness, or unreasonableness), issued in the financial years from July 2000 to June 2010. This period marks when decisions started to be electronically published, through to the most recent decisions available at the time of collating the data set for this study. This timeframe yielded 565 arbitration decisions, which is expected to be all the substantive arbitration decisions the tribunal determined in relation to misconduct derived dismissals during that time.

Tribunal and court decisions provide rich narrative material for quantitative reanalysis (Frazer 1999; Hodson 2008). Here, a quantitative content analysis was used for analysing the 565 published decisions, on the premise that: (a) these decisions 'convey a message from a sender to a receiver'; (b) data extraction could be replicable; and (c) used for hypothesis testing (White and Marsh 2006, 27). Accordingly, a deductive approach to coding was taken, meaning that predetermined categories were developed before the decisions were interpreted and coded. A coding protocol was developed following White and Marsh's (2006, 32) conditions that the protocol provides unambiguous descriptions and examples of the categories with associated numeric codes. A collection 'template' of the categories and codes (Polit and Beck 2004, 571) was also developed. A template was manually completed for each decision while it was assessed for 'correspondence to or exemplification of the identified categories' (Elo et al. 2014, 2), so that each completed template was not unlike a completed survey (Kelly 1999). Thus, a data set appropriate for statistical analysis was systematically assembled (White and Marsh 2006) and input into SPSS software.

The coding protocol and template were piloted in the first instance. Ten arbitration decisions were initially coded by two research assistants in consultation with the primary investigator. Refinements to the coding template and coding protocol for variables measuring formality and advocacy were consequently made to improve clarity. The two assistants subsequently worked independently to code the arbitration decisions. Inter-coder consistency measures were taken to ensure both assistants applied a common interpretation of the coding protocal in assigning their codes. For this check, a 20% coder reliability sample of 110 arbitration decisions, randomly drawn from across the 10-year timeframe, were dual coded for inter-coder consistency measures. Cohen's Kappa was calculated to

measure the consistency of agreement between the coders. Kappa values above 0.8 indicate 'nearly perfect' agreement between coders (Burla et al. 2008). Each of the variables achieved scores ranging between 0.792 and 0.970, indicating 'solid' to 'nearly perfect' agreement between the coders.

Grouping the arbitrators according to their prior work histories

To categorise each arbitrator's work history, Southey and Fry's (2012) three-point typology was adopted, allowing us to identify three independent groups of arbitrators. Southey and Fry's process of categorising the arbitrators' work histories involved searching the Australian Who's Who, parliamentary records, literature, and media searches to assemble this information. They noted the challenge of definitively categorising the work histories so that only arbitrators with an overt employer history were assigned as 'management' and arbitrators with an overt union history assigned as 'union', otherwise they were categorised 'neutral' (we refer to this category as 'blended'). Southey and Fry's classification of work histories have subsequently been used by Freyens and Gong (2017, 2020) and Booth and Freyens (2012).

Summary descriptive statistics for the 565 decisions made by 58 arbitrators is displayed in Table 1 and indicates that the decisions were well-proportioned across the three groups (Table S1). 'Management' arbitrators averaged 12 decisions each, compared to 9 decisions by 'union' arbitrators. 'Union' arbitrators handed down 53% of decisions in the worker's favour, compared to 37% by the 'management' arbitrators. Between these two poles sit the 'blended' arbitrators, with 45% of their decisions in the worker's favour. The statistically significant Pearson chi-square test in Table 1 indicates an association between the arbitrators' backgrounds and direction of their arbitration decisions; justifying a deeper analysis using their work history as a lens to explore variations in their decisions.

Table 1 Decisions by arbitrators' work history descriptive statistics

	'Management' history	'Blended' history	'Union' history	Totals
Number of arbitrators	17	20	21	58
Number of decisions issued	207	159	199	565
Average decisions per arbitrator	12	8	9	10
Total decisions in worker's favour	77	71	106	254
Total decisions in employer's favour	130	88	93	311
SPSS output:				
Pearson chi-square	10.594[a]	df 2, $p = .005$		
Likelihood ratio	10.633	df 2, $p = .005$		
No of valid cases	565			

[a]0 cells (0.0%) have expected count <5. The minimum expected count is 71.48.

Data analysis using hierarchical binary logistic modelling

Freyens and Gong (2017) established that Australian unfair dismissal cases are randomly allocated to the arbitrators, making it possible to convincingly link an arbitrator's characteristics to their decisions because the cases they determine are considered to generally have the same characteristics as the cases considered by other arbitrators. To compare the decisions across the three groups of arbitrators as reflected in Table 1, the dataset of 565 cases was divided into three unique sets according to the arbitrator's work history (i.e. management history – 207 cases; blended history – 159 cases; union history – 199 cases; totalling 565 cases). Each of these datasets catered for at least 10 events/cases per independent variable (IV), limiting sample bias and Type 1 errors (Vittinghoff and McCulloch 2007).

A binary logistic regression model using SPSS was run for each data set to compare the correlational effects between the IVs and the dependent variable (the arbitration decision), while allowing for the ubiquity of the arbitrators' work history by isolating the decisions for each model to a specific work history category. Here, the IV's p value was used as an indicator in the model to identify IVs that contributed significantly to the probability that an arbitration decision was determined in the worker's favour. As is the case here, the p value is a measure that is particularly informative when the IVs of interest are categorical (Weinberg in Grabowski 2016) as linear measures are not feasible. Here, significance at ≤ 0.05 was typically taken to indicate there was sufficient evidence to indicate that the probability of this correlation also exists in arbitral decisions being made under very similar conditions.

Independent variables were entered sequentially into each model using three hierarchical blocks. In each model, the first block reflected the misconduct that seeded the dismissal. The second block contained a set of proxy variables reflecting the legislatively ordained considerations for determining whether a dismissal was harsh, unjust or unreasonable. The final block accounted for 'any other matters considered relevant' and included those IVs identified in prior studies that might be considered by the arbitrators. The blocked design is useful for estimating the impact of each variable while controlling the other IVs previously included into the model. Therefore, our models reflect multivariate analyses that are hierarchically arranged into blocks enabling us to examine whether newly added variables improved the proportion of explained variance in the dependent variable while controlling for prior variables in the model (Kim 2016). Model fit was tested using the Omnibus model chi-square statistic, Hosmer and Lemeshow test, Nagelkerke's R^2, and classification tables.

Model variables

The arbitration decision, as the *dependent variable*, was included as a discrete variable, dummy coded '0' for a decision in the employer's favour; and '1' when the arbitrator overturned management's actions to dismiss the worker (i.e. worker's favour). Refer to Table 2 for the *independent variables* included in the analysis and how these variables align to the relevant features of the industrial legislation that sets the framework for the arbitrators to

determine whether a dismissal is unfair. It is noted that successive industrial legislations that came into play across the 10-year period of decisions (Fair Work Act 2009, Worplace Relations Amendment (Work Choices) Act 2005, Workplace Relations Act 1996). The Acts retained similar guidelines for arbitrators to determine if a dismissal was harsh, unjust or unreasonable (refer to Table 2, which displays how these principles were assessed in the analysis). These legislations instead varied worker access to the tribunal services with implications for workers who were, for example, casual, specified term, probationary employees (Southey 2008). However, we suggest that these variations did not alter the harsh, unjust or unreasonable guidelines that the arbitrators used to judge the fairness of a dismissal. Thus, it was determined that these legislative changes were not an impediment to the analysis (Table S2).

Table 2 Independent variables

Harsh, unjust, unreasonable considerations that arbitrators apply (Fair Work Act 2009)[a]	Independent variable included in the model
Valid reason	PROPERTY; PRODUCTION; PERSONAL; POLITICAL: dummy-coded SEVERITY 1) somewhat serious, 2) serious, 3) highly serious
Notified of that reason	ALLEGATION: dummy-coded
Opportunity to respond	RESPONSE: dummy-coded
Support person present	SUPPORT: 1) union; 2) other non-union; 3) no-one; 4) not identified
Dedicated HRM specialists	EXPERTISE: 1) no HR expert, 2) yes HR expert, 3) not identified FORMALITY (of the dismissal process): 1) informal; 2) semi-formal 3) formal EMPLOYER ADVOCATE (at the hearing): 1) self-represented, 2) employer or industry association, 3) legal firm representative, 4) not identified
Any other matters considered relevant	DISCIPLINARY RECORD: 1) unblemished record, 2) previous offence/s, 3) not identified REMORSE (or apology from the worker): 0) no 1) yes SERVICE: 1) up to 5 years, 2) 5 up to 10 years, 3) 10 years or more, 4) not identified WORKER ADVOCATE: 1) self-represented, 2) union, 3) legal firm representative, 4) not identified

[a]Similar legal guidelines were provided for determining if a dismissal was harsh, unjust or unreasonable across the successive federal industrial legislations during the data collection period.

Results

The results of all three models supported the Hypothesis 1 statement that 'The independent variables that are statistically significant in contributing towards whether an arbitrator will find in favour of the dismissed worker, will vary when these decisions are grouped according to the arbitrators' work histories.' Each of the three models reflects improvements from their respective null model and their ability to predict decision outcomes favouring the employee. At the same time, each model contained variations in the statistically significant factors (IVs) that contributed to the prediction that an arbitrator will find in favour of the dismissed employee. The detailed results for each model are considered next.

The 'management' work history model

With reference to Table 3, the 'management' model is significant according to the Block 3 Omnibus model chi-square statistic (62.212, df = 27, $p = 0.000$). The Hosmer and Lemeshow tests are insignificant, that is, a sound model fit at each stage. Nagelkerke's R^2 increased from 0.08 to 0.354, indicating increasing model predictability. The classification tables sequentially improved decision predictability from 62.8% to 75.8%.

'Management' arbitrators had a statistical significance on the SEVERITY variable. A worker dismissed for engaging in *highly serious* misconduct has lower odds in winning their claim compared to a worker who engaged in *somewhat serious* misconduct ($b = -1.363$, df 1, $p = 0.028$, OR = 0.256 [95% CI 0.076, 0.866]). The RESPONSE variable was statistically significant suggesting an employee who was not permitted to respond to the misconduct accusation has increased odds of receiving a decision in their favour around three times ($b = 1.248$, df 1, $p = 0.021$, OR = 3.483 [95% CI 1.208, 10.042]). Rather than attempting its own defence, an employer's use of a *legal firm advocate* as its EMPLOYER ADVOCATE at the arbitration hearing to defend its decision to dismiss a worker, was statistically significant. Here, there was a decrease in the odds of the decision falling in the worker's favour ($b = -1.245$, df 1, $p = 0.066$, OR = 0.288 [95% CI 0.076, 1.085]). An indication of REMORSE by the worker was statistically significant, with the odds ratio estimate suggesting that the remorseful employee increased their odds of winning their claim around six times compared to an unapologetic employee ($b = 1.915$, df 1, $p = 0.001$, OR = 6.789 [95% CI 2.182, 21.127]). WORKER ADVOCACY was statistically significant, with a worker who used a *legal firm advocate* improving their odds around four times of winning their claim compared to a worker who ran their own representation ($b = 1.535$, df 1, $p = 0.017$, OR = 4.642 [95% CI 1.319, 16.333]).

The 'blended' work history model

Table 4 shows that the 'blended' model is significant based on the Block 3 Omnibus model chi-square statistic (72.502, df 27, $p = 0.000$). The Hosmer and Lemeshow tests are statistically insignificant, that is, a sound model fit at each stage. Nagelkerke's R^2 increased from

Table 3 SPSS nested logistic regression a model of decisions favouring workers by arbitrators with a 'management' work history (n = 207)

Independent variable	BLOCK 3 output					Model fit statistics
	B	SE	Wald	Sig.	OR	
Not applicable	–	–	–	–	–	BLOCK 0 (null model) 62.8% correct predictions
PROPERTY-DEVIANCE	−.765	.630	1.474	.225	.465	After adding BLOCK 1 variables
PRODUCTION-DEVIANCE	.112	.599	.035	.852	1.118	Omnibus test (Model):
PERSONAL-AGGRESS.	−.131	.608	.047	.829	.877	
POLITICAL-DEVIANCE	−.297	.899	.109	.741	.743	• χ^2 12.492 df = 6 p .052
SEVERITY			4.805	.090		Nagelkerke R^2: .080
Serious	−1.136	.675	2.836	.092	.321	Hosmer and Lemeshow:
Highly serious	−1.363	.622	4.805	.028	.256	
						• χ^2 2.263 df = 6 p .894
						Classification: 64.3% correct
ALLEGATION	.147	.576	.066	.798	1.159	After adding BLOCK 2 variables
RESPONSE	1.248	.540	5.336	.021	3.483	Omnibus test (Model):
SUPPORT			5.940	.115		
Non-union person	−1.042	.736	2.000	.157	.353	• χ^2 38.489 df = 18 p .003
No person present	.271	.553	.241	.624	1.312	Nagelkerke R^2: .232
Not identified	−.679	.494	1.885	.170		Hosmer and Lemeshow:
EXPERTISE			.584	.747		
HR expert	.310	.580	.287	.592	1.364	• χ^2 12.846 df = 8 p .117
Not identified	.662	.948	.488	.485		Classification: 69.1% correct
FORMALITY			1.457	.483		
Semi-formal	−.615	.813	.572	.450	.541	
Formal	−1.026	.915	1.257	.262	.358	
EMPLOYER ADVOCATE			3.702	.296		
Industry/Employer assoc.	−.684	.819	.698	.403	.504	
Legal	−1.245	.677	3.383	.066	.288	
Not identified	−1.080	.712	2.297	.130		

Table 3 (*continued*)

Independent variable	BLOCK 3 output					Model fit statistics
	B	SE	Wald	Sig.	OR	
DISCIPLINE RECORD			.915	.633		After adding BLOCK 3 variables
Previous offences	.433	.456	.902	.342	1.542	Omnibus test (Model):
Not identified	.266	.478	.309	.578		
REMORSE	1.915	.579	10.935	.001	6.789	• χ^2 62.212 df = 27 p .000
SERVICE			4.980	.173		Nagelkerke R^2: .354
5–10 years	.722	.519	1.932	.165	2.058	Hosmer and Lemeshow:
10 years or more	.483	.499	.938	.333	1.621	
Not identified	−.748	.681	1.206	.272		• χ^2 10.095 df = 8 p .258
WORKER ADVOCATE			9.497	.023		Classification: 75.8% correct
Union	.371	.665	.312	.577	1.449	
Legal	1.535	.642	5.721	.017	4.642	
Not identified	1.435	.723	3.943	.047		
Constant	.563	1.323	.181	.671	1.756	

Table 4 SPSS nested logistic regression model of decisions favouring workers by arbitrators with a 'blended' work history (n = 159)

Independent variable	BLOCK 3 output					Model fit statistics
	B	SE	Wald	Sig.	OR	
Not applicable	–	–	–	–	–	BLOCK 0 (null model) 55.3% correct predictions
PROPERTY-DEVIANCE	−1.146	1.114	1.058	.304	.318	After adding BLOCK 1 variables
PRODUCTION-DEVIANCE	−.172	1.026	.028	.867	.842	Omnibus test (Model):
PERSONAL-AGGRESS.	−.873	1.001	.761	.383	.418	
POLITICAL-DEVIANCE	−1.858	1.655	1.261	.261	.156	• χ^2 9.481 df = 6 p .148
SEVERITY			5.004	.082		Nagelkerke R^2: .077
Serious	−1.061	.776	1.868	.172	.346	Hosmer and Lemeshow:
Highly serious	−1.523	.684	4.957	.026	.218	
						• χ^2 1.128 df = 5 p .952
						Classification: 61% correct
ALLEGATION	1.126	.874	1.657	.198	3.082	After adding BLOCK 2 variables
RESPONSE	1.869	.721	6.715	.010	6.479	Omnibus test (Model):
SUPPORT			5.001	.172		
Non-union person	−.012	1.006	.000	.990	.988	• χ^2 49.375 df = 18 p .000
No person present	.392	.679	.334	.563	1.480	Nagelkerke R^2: .357
Not identified	1.378	.657	4.403	.036		Hosmer and Lemeshow:
EXPERTISE			2.819	.244		
HR expert	.853	.842	1.027	.311	2.346	• χ^2 8.603 df = 8 p .377
Not identified	−.881	1.176	.561	.454		Classification: 69.8% correct
FORMALITY			4.596	.100		
Semi-formal	−1.706	1.154	2.186	.139	.182	
Formal	−2.531	1.237	4.188	.041	.080	
EMPLOYER ADVOCATE			5.214	.157		
Industry/Employer assoc.	2.689	1.314	4.190	.041	14.71	
Legal	1.711	1.112	2.367	.124	5.535	
Not identified	.944	1.207	.612	.434		

Table 4 (*continued*)

Independent variable	BLOCK 3 output					Model fit statistics
	B	SE	Wald	Sig.	OR	
DISCIPLINE RECORD			10.12	.006		After adding BLOCK 3 variables
Previous offences	−1.303	.498	6.841	.009	.272	Omnibus test (Model):
Not identified	−1.746	.702	6.180	.013		
REMORSE	.186	.571	.106	.744	1.205	• χ^2 72.502 df = 27 p .000
SERVICE			.579	.901		Nagelkerke R^2: .490
5–10 years	−.172	.633	.074	.786	.842	Hosmer and Lemeshow:
10 years or more	−.352	.607	.337	.562	.703	
Not identified	−.772	1.215	.403	.525		• χ^2 6.396 df = 8 p .603
WORKER ADVOCATE			4.748	.191		Classification: 80.5% correct
Union	1.972	.930	4.500	.034	7.187	
Legal	1.103	.862	1.638	.201	3.012	
Not identified	1.084	.957	1.282	.257		
Constant	.426	1.933	.049	.826	1.531	

0.077 to 0.490, indicating increasing model predictability. The classification tables sequentially increased in decision predictability from 55.3% to 80.5%.

The 'blended' arbitrators revealed a statistically significant influence from the SEVERITY variable, whereby workers dismissed for engaging in *highly serious* behaviours have lower odds of winning their claim compared to those workers who had engaged in *somewhat serious* misconduct ($b = -1.523$, df 1, $p = 0.026$, OR = 0.218, [95% CI 0.057, 0.833]). The RESPONSE variable was also statistically significant, suggesting employees who were not permitted to respond to the misconduct accusation are around six times more likely to receive a decision in their favour ($b = 1.869$, df 1, $p = 0.010$, OR = 6.479, [95% CI 1.577, 26.624]). FORMALITY was statistically significant and, compared to an informal process, a *formal* process was negatively correlated with decisions that favour the worker ($b = -2.531$, df 1, $p = 0.041$, OR 0.080 [95% CI 0.007, 0.898]), in which case the employer improved their odds of getting a decision in their favour. Unique to this group of arbitrators was the DISCIPINARY RECORD significance ($b = -1.303$, df 1, $p = 0.009$, OR 0.272 [95% CI 0.102, 0.721]), with workers who had a prior offence on record showing lower odds of winning their claim compared to workers with a clean slate. The employer's use of an *industry or employer association advocate* as its EMPLOYER ADVOCATE at the arbitration hearing, to defend their decision to dismiss a worker, was statistically significant ($b = 2.689$, df 1, $p = 0.041$, OR 14.711 [95% CI 1.121, 193.066]). Here, there was a 14-fold increase in the odds of the decision falling in the worker's favour, compared to decisions where the employer used self-representation. This result would indicate that employers are better advised to have their own managers defend their actions rather than using an industry or employer association advocate, if appearing before a 'blended' arbitrator. A worker who calls upon a *union advocate* as their WORKER ADVOCATE at the arbitration hearing, improved their odds of winning their claim around seven times compared to a worker who represented themself ($b = 1.972$, df 1, $p = 0.034$, OR 7.187 [95% CI 1.162, 44.460]).

The 'union' work history model

As shown in Table 5, the 'union' model is significant according to the Block 3 Omnibus model chi-square statistic (89.855, df = 27, $p = 0.000$). The Hosmer and Lemeshow tests are statistically insignificant indicating a sound model fit at each stage. Nagelkerke's R^2 increased from 0.126 to 0.485, indicating increasing predictive ability. The classification table sequentially increased in decision predictability from 53.3 to 75.9.

Unique to this group of arbitrators was the statistically significant p-value below 0.05 identified for PERSONAL AGGRESSION ($b = -1.546$, df 1, $p = 0.040$, OR = 0.213 [95% CI 0.049, 0.932]), and just above a 0.05 significance value for PROPERTY DEVIANCE, ($b = -1.483$, df 1, $p = 0.060$, OR = 0.227 [95% CI 0.048, 1.065]) and POLITICAL DEVIANCE ($b = -1.748$, df 1, $p = 0.074$, OR = 0.174 [95% CI 0.026, 1.186]). Here, the workers had lower odds of the decisions falling in their favour if the dismissal occurred because of these types of behaviours. The RESPONSE variable is statistically significant whereby an employee without opportunity to respond to the misconduct accusation

Table 5 SPSS nested logistic regression model of decisions favouring workers by arbitrators with a 'union' work history (n = 199)

Independent variable	BLOCK 3 output					Model fit statistics
	B	SE	Wald	Sig.	OR	
Not applicable	–	–	–	–	–	BLOCK 0 (null model) 53.3% correct predictions
PROPERTY-DEVIANCE	−1.483	.789	3.535	.060	.227	After adding BLOCK 1 variables
PRODUCTION-DEVIANCE	−1.156	.739	2.450	.117	.315	Omnibus test (Model):
PERSONAL-AGGRESS.	−1.546	.753	4.214	.040	.213	
POLITICAL-DEVIANCE	−1.748	.979	3.190	.074	.174	• χ^2 19.756 df = 6 p .003
SEVERITY			3.155	.206		Nagelkerke R^2: .126
Serious	−.427	.702	.369	.544	.653	Hosmer and Lemeshow:
Highly serious	−.959	.597	2.581	.108	.383	
						• χ^2 1.163 df = 7 p .992
						Classification: 62.8% correct
ALLEGATION	1.175	.708	2.758	.097	3.239	After adding BLOCK 2 variables
RESPONSE	2.778	.710	15.321	.000	16.08	Omnibus test (Model):
SUPPORT			3.823	.281		
Non-union person	−1.258	.809	2.420	.120	.284	• χ^2 73.077 df = 18 p .000
No person present	−.178	.632	.080	.778	.837	Nagelkerke R^2: .410
Not identified	.245	.465	.278	.598		Hosmer and Lemeshow:
EXPERTISE			.882	.643		
HR expert	.252	.695	.132	.717	1.287	• χ^2 11.205 df = 8 p .190
Not identified	1.250	1.331	.881	.348		Classification: 72.4% correct
FORMALITY			7.453	.024		
Semi-formal	−3.997	1.494	7.161	.007	.018	
Formal	−3.578	1.495	5.727	.017	.028	
EMPLOYER ADVOCATE			1.506	.681		
Industry/Employer assoc.	−.562	.975	.333	.564	.570	
Legal	.191	.646	.088	.767	1.211	
Not identified	−.348	.756	.211	.646		

Table 5 (*continued*)

Independent variable	BLOCK 3 output					Model fit statistics
	B	SE	Wald	Sig.	OR	
DISCIPLINE RECORD			.918	.632		After adding BLOCK 3 variables
Previous offences	.164	.478	.117	.732	1.178	Omnibus test (Model):
Not identified	.508	.531	.915	.339	1.663	
REMORSE	1.316	.577	5.210	.022	3.730	• χ^2 89.855 df = 27 p .000
SERVICE			3.337	.343		Nagelkerke R^2: .485
5–10 years	−.131	.551	.056	.813	.877	Hosmer and Lemeshow:
10 years or more	−.587	.511	1.318	.251	.556	
Not identified	−1.158	.725	2.555	.110	.314	• χ^2 4.493 df = 8 p .810
WORKER ADVOCATE			7.627	.054		Classification: 75.9% correct
Union	2.330	1.002	5.407	.020	10.27	
Legal	2.506	.944	7.042	.008	12.25	
Not identified	1.895	1.041	3.312	.069	6.652	
Constant	2.988	1.939	2.376	.123	19.84	

improved their odds of a win 16-fold ($b = 2.778$, df 1, $p = 0.000$, OR = 16.080 [95% CI 4.002, 64.614]). FORMALITY was statistically significant, and, compared to an informal process, increasing formality of the dismissal process from *semi-formal* ($b = -3.997$, df 1, $p = 0.007$, OR 0.018 [95% CI 0.00, 0.343]) to *formal* ($b = -3.578$, df 1, $p = 0.017$, OR 0.028 [95% CI 0.001. 0.523]) was negatively correlated with decisions that favour the worker. REMORSE by the dismissed worker was statistically significant with remorseful employees improving their odds of a win by 3.7 times compared to the unremorseful ($b = 1.316$, df 1, $p = 0.022$, OR 3.730, [95% CI 1.204, 11.551]). WORKER ADVOCACY was statistically significant, with workers who engaged a *legal firm advocate* improving their odds of winning their claim 12-fold, compared to trying to represent themself ($b = 2.506$, df 1, $p = 0.008$, OR 12.253 [95% CI 1.925, 77.983]). In addition, workers who used a *union advocate* to present their claim at the arbitration table had a 10-fold increase in the odds of a win compared to relying on self-representation ($b = 2.330$, df 1, $p = 0.020$, OR 10.274 [95% CI 1.442, 73.198]).

Discussion

Australia's industrial landscape tends to be adversarial and the tribunal members who consequently arbitrate elements of the employer–employee relationships exercise significant influence over workplace relations (Bray, Macneil and Stewart 2018). With that power, their decision-making process, as much as the decisions themselves, warrant scrutiny. The industry intelligence that they bring to their decision making appears to reside in the crystallised knowledge fundamentally forged during their preceding industry-based work experiences.

Arbitrators are bound by legislative guidelines to determine if a dismissal was harsh, unjust or unreasonable (as per Table 2). However, as the results supported the Hypothesis 1, it appears that despite the existence of these legislative guidelines, there are variations in a range of factors significantly associated with their decisions. Based on media commentary about partiality in the tribunal (Patrick 2017) and prior studies indicating the presence of bias in arbitral judgements (Helm, Wistrich and Rachlinski 2016; Malin and Biernat 2008), one might initially conclude that these differences show manifestations of a subconscious or implicit bias towards either workers or employers. However, in the absence of developing a specific implicit association test (Greenwald, Nosek and Banaji 2003) there is insufficient evidence to say a *specific* worker and/or employer bias is at play. That said, the significant decision factors that were detected did align with unitarist and pluralist frameworks and therefore there are grounds to suggest that the arbitrators may have *ideological preferences* for managing conflict with individual workers, ranging from systemised, policy-driven approaches (unitarist), to loyal, organised opposition (pluralist).

Therefore, what are the implications of these ideological preferences manifesting in the decisions? To explain, we thematically arranged the key findings about how these decisions varied across the arbitral groups, into three types of 'decision styles': the *systems-*

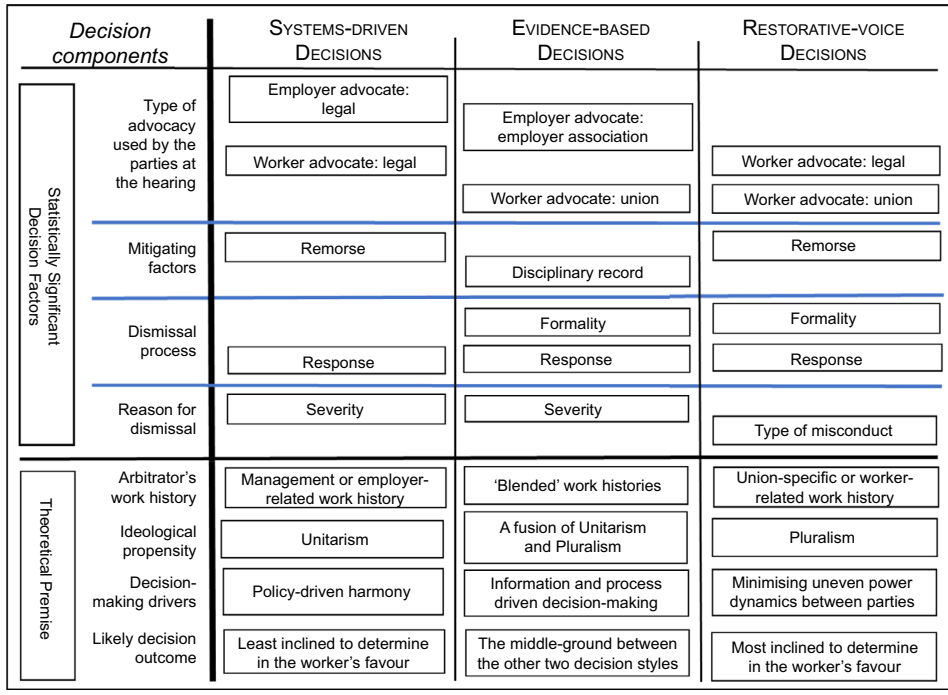

Figure 1 Typology of the arbitral decision styles found in misconduct-related dismissals [Colour figure can be viewed at wileyonlinelibrary.com]

driven style, the *evidence-based* style and the *restorative-voice* style (see Figure 1). These styles are inductive by nature, based on the quantitative results, characterising general patterns of noticeable 'touchpoints' in the arbitrator's deliberations.

The 'systems-driven' decision style

The systems-driven decision style reflects factors associating with seeking policy and 'systems-driven' team harmony and cooperation (Kaufman 2019). The trademark of a systems-driven decision style is an interest in the employer prerogative to dismiss a worker. Consequently, this decision style is least inclined to determine in the former employee's favour, commensurate with the unitarist principle that management controls how conflict will be subdued and determine how to manage employee welfare (Cullinane and Dundon 2014). Aligned with the unitarist idea of managerial prerogative, arbitrators with a systems-driven decision style are unlikely to be influenced by union representatives who advocate on behalf of the dismissed worker at the arbitration hearing. Instead, the systems-driven decision style is more symptomatically influenced by legal advocates presenting both the dismissed worker's case and the employer's defence. To understand why this decision style is characteristically swayed by lawyers advocating for the dismissed worker yet not by union representatives fulfilling the same advocacy role, the resistance

between management and unions (fundamental to the unitarist perspective) needs to be acknowledged, where management may even view unions as unnecessary (Cullinane and Dundon 2014).

Unlike the other two decision styles, the formality of the process adopted by the employer in dismissing the work is not salient in the decision, reflecting either a level of sensitivity to the employer's plight and a unitarist preference that employers have managerial prerogative to control non-conforming employees. Another distinguishing feature of this style is that the misconduct act itself is of less salience than the gravity of the act. Being pedantic about the act's severity indicates a concern for how the organisation and its stakeholders were impacted by the act, that is, a systems view rather than a granular view of the dismissed individual's misconduct. This decision style places weight on whether the employer permitted the worker to respond to the allegation as a marker for compliance with a fair process. Unitarists seek shared goals and quell conflict (Budd and Bhave 2019), and a distinguishing attribute of the systems-driven style is its sensitivity towards workers who apologised for their transgression. With the unitarist emphasis on commonality between employer and employee interests, in the systems-driven style, peace-making gestures from the worker may be viewed as an effort to restore the management–employee harmony by signalling that the worker acknowledges their breach of the employment relationship.

The 'evidence-based' decision style

The evidence-based decision style reflects a middle-ground between the other two styles for being inclined to determine in the former employee's favour. Drawing on quantifiable evidence on which to base a decision is the hallmark of this style, and we deduce that a fusion of pluralist and unitarist ideals might underlie the distinctive nature of this decision style. The evidence-based style consists of a unique combination of factors representing the use of formal procedures supported by evidence. Antcliff and Saundry (2009) suggest the extent and quality of the documentation indicates the degree of formality adopted in the process. Therefore, in this style, the degree to which an employer can produce physical evidence in the form of written advice of the allegation, along with periodic documented meetings reflecting careful examination and consideration of the circumstances of the event, are essential factors in the arbitrator's deliberations. At the same time, the presence of a prior disciplinary record provides additional concrete evidence that the worker's behaviour leading to the dismissal was not an isolated incident.

Like the systems-driven decisions, this style also 'quantifies' the behaviour based on the severity or gravity of the misconduct; for example, stealing a pencil from the stationery cupboard is less serious than stealing 50 dollars from the register. Also unique to this style is that remorse is not salient in the arbitrator's deliberations, perhaps as remorse is not 'quantifiable evidence', but an emotional appeal. This is a significant point of differentiation from the other two decision styles, reflecting that the underlying philosophy of the evidence-based style is not as strongly tied to either a pluralist or unitarist framework. Thus, the role of an apology in either compromising/negotiating (pluralist) or seeking

harmony (unitarist) is not so pertinent. Advocacy plays an interesting and unique role in this decision style by minimising the need for legal representation. This style is the only style where submissions from legal advocates, from either party, have no significant influence. Instead, it responds strongly to union representatives acting on behalf of the dismissed employee, which is a distinctly pluralist position. Meanwhile, reflecting a unitarist approach that the employer draws upon their own HRM system, this decision style responds favourably to employers who self-represent their defence, compared to employers who use an employer association or industry association representative at the arbitration hearing.

The 'restorative-voice' decision style

The restorative-voice decision style focuses on minimising the uneven power dynamic between employer and employee. Among the three decisions styles, this style is most inclined to determine in the former employee's favour. We contend that these decisions have a pluralist influence reflecting several of the pluralist principles listed by Kaufman (2019) of competing interest groups, negotiation and compromise, institutional power balancing, and independent, collective representation. It is also the decision style that is most sensitive to whether an employee was given the opportunity to respond to and present their version of events to the employer and defend their position before the dismissal was executed. The restorative-voice decision maker also places value on the employee using either a union or legal advocate to assist them with their claim at the arbitration table. Noticeably limited in this decision style is the ability of the employer's advocate to influence the arbitration outcome, reflecting the pluralist preference for external mechanisms to provide 'voice' to lesser powered employees (Budd and Bhave 2019).

The restorative-voice style is instead characterised by the type of misconduct the employee engaged in to warrant the dismissal, making this decision style the most sensitive towards the substantive matter of the employee's offending behaviour. Unique to this style, is that the type of misconduct is more significant than the severity or gravity of the act; for example, stealing a pencil from the stationery cupboard is likely to be considered as corrupt as stealing 50 dollars from the register. Such rigid, all-or-nothing assessment potentially provides a stable baseline across cases and decisions. This point is relevant in relation to the final factor that defines the restorative-voice style, which is a sensitivity towards the worker's attempt to restore their employer's favour by being remorseful or apologetic for their actions. In line with this decision style's focus on the restorative opportunity residing within the decision, an apology from a worker in arbitration, according to Kaspar and Stallworth (2012, 59) has the potential to 'heal or repair relationships, save money, and decrease litigation of all types'.

Implications of the three decision styles on practice

For the here and now, these decision styles provide intelligence for assembling strong HR policies and processes. For instance, developing a more complete performance management system that contains better informed procedures for managing misconduct, and

developing or refining the training provided to the HR team and supervisors in managing misconduct.

In future, the decision styles can assist parties to assess their position when deciding whether to defend or settle an unfair dismissal claim. In regions where the dispute resolution systems allow arbitrator selection, these decisions styles provide key insights for parties for selecting arbitrators with a particular work history and also for preparing their cases. Otherwise, as is the Australian way, chance comes into play in the assignment of an arbitrator and the decision style they imbue, meaning that final determinations could vary depending on the arbitrator. And, although appeal mechanisms exist (FWC 2022), the unitarist-pluralist ideology inherent in the decisions are unlikely to lead to an error of law or fact required for gaining permission to appeal. Therefore, the problem remains that arbitrators can render procedurally and legally accurate decisions, while concurrently, the implicit predispositions of workplace relations ideologies are competing with the quest for neutral and impartial decision making. Here, paying attention to all the factors across the three decision styles could be used to assist in assessing the strengths and weaknesses of the case and preparing accordingly.

Ultimately, these decision styles were designed to provide the intelligence to guide a disciplinary-dismissal process that can be aligned to justice and fairness expectations. The commonality across the significant 'decision elements' in Figure 1, is the 'processes used to dismiss', that is, whether the employee was afforded procedural fairness. The impetus is therefore on management to have exceptional disciplinary processes to ensure right of reply opportunities are given to a worker. In terms of the 'reason for dismissal', the systems-driven and evidence-based decision styles would suggest that management, when making disciplinary decisions, should give more weight to the *gravity* of the misconduct, rather than the *type of misconduct* itself. However, taking both elements into account will provide a surer coverage of having a valid reason to enact a dismissal. Each incidence of misconduct should be assessed on its own merits and employers are urged to consider the presence of 'mitigating factors' as they may well be reason to reduce the severity of the disciplinary action they pursue. Notably, workers who apologised for their actions have provided a highly salient mitigating factor, while a prior disciplinary record is a potential mitigating factor. That is, a prior record is not automatic grounds for dismissal. In the event a claim appears before an arbitrator, the 'type of advocacy' becomes salient, and workers need to avoid self-representation as their interests appear to be best served by unions or legal agents regardless of which decision style is present. While employers may benefit in certain cases from legal or employer association advocacy, they have less choice, with evidence-based decision styles showing insusceptibility to the effects of skilled advocates appealing on management's behalf.

Limitations and future research

There are nuances and subtleties in arbitral decisions not captured in this study such as non-verbal characteristics at play during hearings, demeanour of the parties and witnesses,

and arrays of evidence. The analysis focused on misconduct-based decisions and other factors not included here may well be at play when employees are dismissed for other reasons. The age of the data set is noted as a potential limitation as we cannot discount that there may be differences in decisions issued during the proceeding decade. However, the decision styles presented here do reflect the same guiding principles of determining whether a dismissal was harsh, unjust and unreasonable that are applied by present-day arbitrators. Further, Southey and Fry's (2012) categorisation of work history by assigning the arbitrator's career choices into strictly one of three options, does not allow for exceptions to the rule, particularly when it is suggested that people can personally subscribe to one set of employment relations philosophies, but practise another (Cullinane and Dundon 2014). The research was guided by Fox's (1971) original binary of unitarism and pluralism, noting that additional frameworks exist in the employment relations literature and more broadly in the industrial relations, political science, law and history traditions (Budd and Bhave 2019; Cradden 2011; Fry and Mees 2017; Bray, Macneil and Stewart 2018; Ressia, Werth and Peetz 2019). Knowledge gaps exist in relation to the procedural faults that undermine the delivery of organisational justice, including designing disciplinary systems aimed towards improving productive and ethical resolution of employee misconduct, and worker's career experiences post their dismissal. And studies that demonstrate workplace relations ideologies via descriptive applications of their influence, could assist management and workers understand interactions and behaviours that occur in the employment relationship.

Conclusion

Parties preparing for an unfair dismissal hearing might ponder the question, 'Is the arbitrator "union" or "employer"?' Arbitrators and the tribunal as an institution, fundamentally seek to ensure that natural justice and legislative abidance was present in the dismissal. However, the concern about the 'tendencies' of the arbitrator persist. The typology of arbitral decision styles in unfair dismissal can assist by providing insights on the ideological preferences the parties might encounter in their arbitrator.

In terms of national institutional policies, it may be beneficial for appointing authorities to preference candidates who have career profiles like the 'blended' group for tribunal/arbitral appointments, which would include preferencing people who had not worked singularly as agents of either the worker or employer. In relation to stakeholder impacts, nearly half of the arbitration decisions overturned management's dismissal actions, indicating that dismissal is being misused in workplaces as a disciplinary process. This article provides cause to reflect on the use of extreme disciplinary practices. Managers should limit their exposure to unfair dismissal claims from the outset, by assessing and if necessary, redesigning HRM systems and policies such as recruitment and selection, performance management and training, and reward and recognition as intelligent use of these HR systems are likely to encourage engaged employees. To minimise the inappropriate use of dismissal, management should champion supportive workplace cultures and adopt

conservative, progressive disciplinary processes, with the decision to dismiss a worker the least preferred and most circumspect course of action.

The decision typology responds to Budd and Bhave's (2019) call to make the implicit nature of employment relations ideologies explicit in scholarship and practice so that we can achieve a shared understanding of work. Australia's current industrial relations reform bill that was passed by the Senate at the time of writing, underscores the value of having a shared understanding of the ideologies at play in individual-level dispute arbitration. While the bill's marque reform paves the way for multi-employer (pay) bargaining, of more relevance in this article is the employee's right to flexible working arrangements, particularly for carers and parents of school children. Notably, the FWC will be empowered under this reform to *formally arbitrate* conflicts between workers and employers in relation to flexible arrangements. The power of the arbitrators to reach individual workers directly and influence their workplace relationships will be further expanded by this agenda. For instance, in addition to unfair dismissal services, the FWC provides services to workers related to other workplace issues such as bullying, sexual harassment, discrimination and adverse actions. Australian workers are being given unprecedented personal access to a tribunal structure to review and potentially correct the power dynamics of their personal employment relationship. Whether this is the best use of the Commission's time and government resources is outside this article's ambit. However, what is relevant, and valuable, is the shared understanding of the decision patterns encountered at arbitration as the Commission's powers increasingly move towards settling individual disputes.

This reform will see a further tightening of regulation on Australian businesses in an IR culture that is already noted for its adversarial nature (Bray, Macneil and Stewart 2018). Out of this concern, recent scholarship by Bray, Macneil and Stewart 2018 promotes the ideals of 'collaborative pluralism', that is, genuine co-operation between management and unions, with the FWC providing a facilitative and guidance role to drive co-operation and productivity. Paradoxically, in playing such a role, the IR ideology to which its individual members subscribe could be openly surfaced and even valued for the perspective that these frameworks bring to the collective wisdom necessary for a 'collaborative pluralism' mechanism to function.

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